

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

JUN 6 6 12 PM '00

In the Matter of)	
)	
Toll Free Service Access Codes)	CC Docket No. <u>95-155</u> ,
)	
Database Services Management, Inc.)	NSD File No. L-99-87
Petition for Declaratory Ruling)	
)	
Beehive Telephone Company)	NSD File No. L-99-88
Petition for Declaratory Ruling)	

FIFTH REPORT AND ORDER in CC Docket No. 95-155
ORDER in NSD File No. L-99-87
ORDER in NSD File No. L-99-88

Adopted: June 28, 2000

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By the Commission:

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I. INTRODUCTION

1. In this Order, we resolve outstanding issues raised in our toll free number rulemaking proceeding¹ related to the propriety of Database Service Management Inc. (DSMI) serving as an administrator of the toll free number database system as well as related issues referred to the Commission from the United States District Court for the District of Utah.² We approve the recommendation of the North American Numbering Council (NANC) that DSMI continue to serve as the administrator of the toll free number database system, referred to as the SMS/800 system, at this time. We find that DSMI is an impartial administrator under section 251(e)(1) of the Communications Act.³ We also resolve seven specific issues presented in petitions for declaratory ruling filed by Beehive Telephone Company (Beehive) and DSMI, following court referral, relating to the propriety of DSMI's administration of the SMS/800 system, and the revocation of toll free numbers assigned to Beehive. In doing so, we conclude that access to the SMS/800 database is properly tariffed and administered as a common carrier service. We further conclude that the Commission's determination that access to call-related databases and service management systems are unbundled network elements under section 251(c)(3)⁴ does not invalidate the existing interstate tariff under which toll free service providers purchase access to the centralized SMS/800 database offered collectively by the Bell Operating Companies (BOCs). Finally, we direct the North American Numbering Council (NANC) to provide recommendations on restructuring the ownership and operation of the current system of toll free number administration.

II. BACKGROUND

A. Overview - The Toll Free Service System

2. Toll free service is an interexchange service in which subscribers agree in advance to pay for all calls made to them using a predesignated toll free telephone number. Toll free numbers are contained in a centralized database, the Service Management System/800 (SMS/800) database, and use of the database is offered jointly by the BOCs through a tariff.⁵ This centralized toll free number administration system has the following components:

SMS/800 Database. The SMS/800 database contains all toll free numbers in the North American Numbering Plan, along with electronic records for those numbers. The records include information such as the identity of the subscribers' telephone numbers to which toll free calls will be routed (area

¹ In the Matter of Toll Free Access Codes, CC Docket No. 95-155.

² *Database Service Management, Inc. v. Beehive Telephone Company, Inc.*, Civ. No. 2:96-CV-188J (C.D. Utah Jan. 20, 1999). Following referral, the parties before the court presented the issues to this Commission in petitions for declaratory ruling filed by Beehive Telephone Company Inc. (Beehive) on January 29, 1999, and by Database Service Management, Inc. (DSMI) on February 17, 1999.

³ 47 U.S.C. § 251(e)(1).

⁴ 47 U.S.C. § 251(c)(3).

⁵ The tariffed service is described as "a national system which is used to update locally deployed databases," and is the focal point for initial service provisioning and all subsequent changes to the toll free subscriber's service. It supports number administration, creation and modification of customer records. *See SMS/800 Functions Tariff* F.C.C. No. 1 at 47.

providing services under the Act.⁸⁴ As we have stated before, “there is nothing in section 203 which colorably suggests that Congress intended to prohibit carriers from using agents to enforce provisions of their tariffs.”⁸⁵ It is not unusual for a common carrier that files a tariff to select an agent to perform certain functions associated with provision of a tariffed service. The National Exchange Carrier Association (NECA), for example, is not a common carrier, but it files, bills, and collects charges contained in interstate access tariffs on behalf of the issuing common carriers.⁸⁶ Similarly, DSMI, although it is not a common carrier, acts as the business representative of the SMT, which is comprised of the BOCs, and provides day-to-day management and oversight of the tariffed services. We find nothing inappropriate about the BOCs’ selection of an entity that is not a common carrier to perform certain tariff-related functions on their behalf.

40. Issue 6: Whether DSMI gave proper notice before discontinuing service to Beehive. Beehive alleges that DSMI violated the tariff because DSMI terminated Beehive’s service without notice.⁸⁷ Section 2.1.8(A) of the tariff requires 30 days’ written notice prior to terminating a Resp Org’s access to the SMS/800 database system. DSMI states that it provided written notice on three separate occasions, with its last letter dated March 22, 1994, and Beehive doesn’t dispute receipt of these letters.⁸⁸ More than 30 days later, on April 26, 1994, Beehive’s service was suspended.⁸⁹ We therefore find that DSMI’s notice to Beehive was proper.

41. Issue 7: Whether Beehive held a constitutionally protected property interest in toll free numbers that DSMI violated by discontinuing service to Beehive. It is well-established that no entity has a proprietary or ownership interest in any numbers, including toll free numbers.⁹⁰ Beehive maintains that it was deprived of a constitutionally protected property or ownership interest when DSMI disconnected its 800-629-XXXX numbers, reasoning that the opportunity to make use of numbers has marketing value that may not simply be taken away. On the other hand, DSMI contends that numbers are a public

⁸⁴ 47 U.S.C. § 217 (“Liability of Carrier for Acts and Omissions of Agents”). Section 217 states that, in construing and enforcing the provisions of the Act, “. . . the act, omission, or failure of any office, agent or other person . . . shall be deemed to be the act, omission or failure of such carrier or user as well as that of the person.” It does not require that the agent be a common carrier.

⁸⁵ In the Matter of Communique Telecommunications, Inc. d/b/a/ Logical Application for Review of the Declaratory Ruling and Order Issued by the Common Carrier Bureau, *Memorandum Opinion and Order*, FCC 99-80, rel. Aug. 9, 1999 at paras. 19 and 24.

⁸⁶ NECA Tariff No. 4.

⁸⁷ Beehive Reply at 16.

⁸⁸ DSMI Reply at 11 (referring to letters dated November 29, 1993, February 14, 1994, and March 22, 1994).

⁸⁹ DSMI Addendum to Petition of Database Service Management, Inc. for Expedited Declaratory Ruling at 2.

⁹⁰ The Commission stated in the *Second Report and Order* that “telephone companies do not ‘own’ codes or numbers, but rather administer their distribution for the efficient operation of the public switched telephone network” 12 FCC Rcd at 11185-86 (citing *Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, *Declaratory Ruling*, 2 FCC Rcd 2910, 2912 (1987)). The SMS/800 Tariff comports with this policy, providing, “No individual or entity (e.g., subscriber/assignee, service provider, etc.) shall acquire any interest in, or proprietary right to, any 800 telephone number assigned to the 800 subscriber.” Section 2.1.7, *Provision and Ownership of 800 Telephone Numbers*.

numbers for personal and business purposes, and for access to such services as voice mail and paging devices.

B. History of Toll Free Service and Section 251 Requirements

4. In 1967, AT&T began providing toll free service. Following AT&T's 1984 breakup,⁹ the BOCs succeeded AT&T in providing toll free number "area-of-service routing," which is the routing of calls by local exchange carriers to the appropriate IXC, depending upon the local access and transport area (LATA) in which the calls originated.¹⁰ Initially, the BOCs accomplished this by associating a particular NXX¹¹ with a particular carrier. That system, however, precluded "portability," which is the ability of subscribers to change IXCs while retaining the same toll free number. Thus, subscribers wishing to change their IXCs had to change their toll free numbers in order to do so.

5. In 1993, the Commission mandated that the BOCs develop a centralized database system to facilitate toll free number portability. Under this system, all toll free numbers are contained in a centralized database, and the LEC originating a call reads the entire number, interacts with the SCP to determine the IXC designated to carry the call, and transmits the call accordingly. Subscribers can thus change RespOrgs or IXCs without changing their toll free telephone numbers.¹² At the same time, the Commission also required that the service be offered as a common carrier service under tariff, to ensure that the service would be offered on a non-discriminatory basis and at reasonable rates.¹³

6. In 1995, the industry informed the Commission that available 800 toll free numbers were being depleted at an accelerated pace and were likely to run out before the scheduled roll-out of the first new toll free access code, 888, on March 1, 1996. The Commission therefore instituted the Toll Free Access Codes proceeding and proposed rules to ensure that toll free numbers would be allocated on a fair, equitable, and orderly basis.¹⁴ The Commission also took steps to conserve the use of toll free numbers to preclude a temporary shutdown of the toll free database system that might have resulted from an overload in the reservation process for the new 888 numbers.¹⁵

⁹ See *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, *Maryland v. United States*, 460 U.S. 1001 (1983). The Court ordered AT&T to divest its interest in the Bell Operating Companies (BOCs), which provided local exchange service.

¹⁰ Provision of Access for 800 Service, *Order*, CC Docket No. 86-10, 8 FCC Rcd 1423 (1993) (*CompTel Declaratory Ruling*).

¹¹ Telephone numbers are typically designated NPA-NXX-XXXX. The NXX, or the "central office code," is the series of three digits following the area code. The NXX is also referred to as the "exchange."

¹² *Id.*

¹³ *CompTel Declaratory Ruling*, 8 FCC Rcd at 1426-27.

¹⁴ Toll Free Access Codes, *Notice of Proposed Rulemaking*, CC Docket No. 95-155, 10 FCC Rcd 13692 (1995) (*NPRM*).

¹⁵ The Commission delegated to the Common Carrier Bureau authority to handle the issues essential to the March 1, 1996 opening of the 888 code. Toll Free Access Codes, *Order*, CC Docket No. 95-155, 11 FCC Rcd 3045 (1996). The Bureau then established an interim number conservation plan for 800 and 888 numbers, to protect the toll free database system from possible overload and shutdown during the number reservation process. Toll Free Access Codes, *Report and Order*, CC Docket No. 95-155, 11 FCC Rcd 2496 (1996).

carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis. . . .⁷¹ Beehive contends that under section 251 (c)(3), common carriers such as Beehive, Sprint, and MCI have the right to purchase access to the SMS/800 database as a UNE. DSMI and the BOCs argue that section 251(c)(3) applies only to the BOCs' separately owned networks and, because the BOCs jointly own the SMS/800 database, it is not a UNE.⁷² Beehive also contends that the 1996 Act precludes the Commission from continuing to require that access to the SMS/800 database be tariffed under section 203 of the Act because we determined that the SMS/800 database system is also accessible as a UNE under section 251(c).⁷³

33. Although we have found that access to the SMS/800 database and the SMS/800 system are available as UNEs pursuant to section 251(c)(3) of the Act, we expressly reject Beehive's argument that this invalidates the existing interstate tariff. The Commission recognized in the *Local Competition Third Report and Order* that ILECs may offer a tariffed retail service that is functionally equivalent to a specific UNE. The Commission found that, in determining whether or not an ILEC should provide access to a UNE, it would assign little weight to the availability of the tariff as an alternative because Congress gave competitive LECs a distinct opportunity, through section 251(c)(3), to use UNEs regardless of the availability of tariffed retail or resold services.⁷⁴

34. The findings in the *Local Competition Third Report and Order* can in no way be read to invalidate a tariffed offering simply because that offering could be equivalent to a specific UNE. An ILEC has a duty under section 251(c)(3) to provide access to UNEs to a requesting telecommunications carrier for the provision of a telecommunications service while a tariffed offering available under section 203(c) of the Act is available to any person.⁷⁵ Beehive's request to invalidate a tariffed offering simply because it is available as a UNE ignores a fundamental difference between sections 251(c)(3) and 203(c) of the Act, and would effectively deny access to the offering to entities that are not eligible to obtain UNEs under section 251(c)(3).

35. Issue 2: Whether DSMI is an impartial administrator of the SMS system, under section 251(e). We have concluded in this Order that DSMI is impartial and may continue to serve as a toll free administrator.⁷⁶

36. Issue 3: Whether the SMS/800 system complies with section 251(e)(2), which requires the costs of number administration arrangements and number portability to be borne by all carriers on a competitively neutral basis. RespOrgs, the users of the SMS/800 system, bear the costs associated with SMS/800 system administration in proportion to the quantity of toll free numbers they reserve or manage. Because the same rates are assessed against all RespOrgs under the SMS/800 Tariff, we find that the costs of toll free number administration are borne on a competitively neutral basis in accordance

⁷¹ 47 U.S.C. § 251(c).

⁷² BOC Comments at 5, DSMI Reply at 4.

⁷³ Beehive Reply at 6.

⁷⁴ See *Local Competition Third Report and Order*, 15 FCC Rcd at 3732.

⁷⁵ 47 U.S.C. §§ 251(c)(3), 203(c).

⁷⁶ See paras. 16 – 25, *supra*.

Third Report and Order the Commission directed the North American Numbering Council (NANC) to examine the issue of toll free number administration and recommend an entity to assume the duties of toll free number administration.²⁴

9. In 1998, in response to the Commission's directive, the NANC submitted a letter recommending that DSMI remain the toll free number database administrator.²⁵ The NANC stated in its letter that Bellcore had recently been sold to Science Applications International Corporation (SAIC), which is not identified with any particular segment of the telecommunications industry, and determined that its subsidiary DSMI was therefore an impartial and neutral administrator.²⁶ In a public notice, the Commission requested comments on the NANC's recommendation.²⁷ In their comments, Telcordia, Ameritech, Bell Atlantic, BellSouth, SBC and US West generally supported the NANC's recommendation, whereas Beehive, AT&T, MCI WorldCom, and Sprint (non-BOC RespOrgs) strongly opposed it.²⁸ We address the NANC's recommendation below.²⁹

C. History of the Beehive-DSMI Dispute

10. The petitions for declaratory ruling that we resolve in this Order arise from a dispute originating in 1989, at which time Beehive Telephone Company, Inc. (Beehive), an incumbent local exchange carrier, received from Bellcore 10,000 toll free numbers in the "800" numbering plan area with the NXX prefix 629. In 1993, when the centralized database system was created, Beehive was authorized to act as a RespOrg. In 1994, after Beehive failed to pay service and late payment charges in accordance with the terms of the SMS/800 Tariff, DSMI revoked Beehive's RespOrg status and suspended services to Beehive. DSMI then requested that Beehive direct its customers to select a new RespOrg. After Beehive failed to do so, DSMI began disconnecting the numbers.

11. In 1996, DSMI filed a suit in federal district court to collect Beehive's unpaid charges.³⁰ Beehive then tendered payment to DSMI, but also filed an answer and a five-count counterclaim. In 1997, Beehive re-qualified as a RespOrg. and amended its counterclaim by adding two more counts. In

²⁴ The NANC is a federal advisory committee created to advise the Commission on numbering administration issues.

²⁵ Also in 1998, the Commission ruled on the roll-out of the 888, 877, and subsequent codes, in Toll Free Access Codes, *Fourth Report and Order and Order and Memorandum Opinion and Order*, CC Docket No. 95-155, 13 FCC Rcd 9058 (1998).

²⁶ Letter from Alan C. Hasselwander, Chairman, North American Numbering Council, to A. Richard Metzger, Jr., Chief, Common Carrier Bureau, CC Docket No. 95-155 (filed March 25, 1998) (*NANC Letter*).

²⁷ Common Carrier Bureau Seeks Comment on North American Numbering Council Recommendation that Database Services Management, Inc. Remain the Toll Free Database Administrator, *Public Notice*, CC Docket No. 95-155, NSD File No. L-98-85, DA-98-1112 (rel. June 11, 1998).

²⁸ Comments were filed July 1, 1998, by Bellcore, MCI Telecommunications Corporation, and Sprint Communications Company. Replies were filed July 13, 1998, by Bellcore, BellSouth, Beehive, MCI, and (jointly) Ameritech, Bell Atlantic, SBC, and US West. An ex parte statement dated August 31, 1998, was filed by Ameritech on behalf of the BOCs.

²⁹ See paras. 15-25.

³⁰ *DSMI v. Beehive*, No. Civ. No. 2:96-CV-188J (C.D. Utah filed Mar. 1, 1996).

local telecommunications market; for example, the BOCs now represent a segment of the telecommunications industry in which at least some competition exists, unlike seven years ago when the tariffed system was established. The significant growth in competition has also brought about a marked increase in the demand for more toll free and other numbers, as new competitors seek to serve their customers and new services are offered. Thus, continued ownership and control by the BOCs over the toll free number administration system may no longer be warranted for competitive reasons.

27. We are also concerned about whether, from a practical standpoint, ownership and control of the centralized database by any telecommunications service provider is an appropriate structure for toll free numbering administration because of service quality issues that have arisen and apparently remain unresolved. In a recent letter to the Commission, ATIS observed that RespOrgs have experienced increasing difficulties with the SMS/800 system since 1997, noting that system congestion has increased as Numbering Plan Area splits have increased.⁶⁰ Additionally, some commenters in this proceeding claim to have experienced poor service under the SMS/800 Tariff.⁶¹ These commenters, however, do not attribute the service quality problems to DSML, but to the BOCs, who own the database and offer the service through the SMS/800 Tariff.⁶² We decline to address these specific allegations in the context of this proceeding; such alleged instances of non-compliance with the terms of the SMS Tariff are best addressed through the complaint process.⁶³ Nevertheless, we recognize, generally, the need to consider whether these and other issues can be addressed and resolved through restructuring of the current administration system.

28. We look to our Federal Advisory Committee on numbering issues, the NANC, for a recommendation on how best to administer toll free numbers. We ask the NANC to address whether a system of administration similar to that used to administer the NANP or a different system should be established. Among the alternatives NANC should consider is whether the ownership and operation of the centralized toll free database system should be transferred to a non-government and/or non-carrier entity, and whether SMS/800 service should continue to be provided under tariff. Additionally, we seek recommendations from the NANC to facilitate the selection of the administrator through a competitive bidding process similar to the process used to select the North American Numbering Plan Administrator.⁶⁴ Specifically, we ask the NANC to develop the necessary technical requirements for toll free number administration. We direct the NANC to submit its recommendations to the Commission within 180 days of the effective date of this Order. Upon receipt of the NANC's recommendations and public comment, we will move expeditiously to determine whether it is in the public interest to restructure the ownership and operation of the current system of toll free number administration, and, if

⁶⁰ Letter from Ronald D. Havens, OBF Moderator, to L. Charles Keller, Chief, Network Services Division, Common Carrier Bureau, CC Docket No. 95-155 (filed Feb. 15, 2000).

⁶¹ See *January 7, 2000, Ex Parte Letter* (also complaining about high tariff rates). See also MCI Comments at 3 - 4 and Sprint Comments at 2 - 3, both filed July 1, 1998, and WorldCom Reply at 3 - 4, filed July 13, 1999.

⁶² *Id.*

⁶³ To the extent that parties can demonstrate that the BOCs or their designees are not administering toll free numbers pursuant to the terms of their own tariff, they may pursue an enforcement action to ensure that the terms of the tariff are met. See sections 1.701 - 1.736 of the Commission's rules, 47 C.F.R. §§ 1.701 - 1.736.

⁶⁴ See *Third Report and Order*.

A. Toll Free Number Access Codes Proceeding

15. In the *Third Report and Order*, the Commission concluded that, as then structured, DSMI's administration of the toll free number database was inconsistent with section 251(e)(1). In this section, we address whether DSMI currently is impartial within the meaning of section 251(e)(1). We find below that DSMI meets the impartiality requirements in section 251(e)(1) of the Act, and thus may continue to serve as the toll free number database administrator. We also seek recommendations from the NANC on restructuring the ownership and operation of the current system of toll free number administration, and on the technical requirements for selecting a toll free number administrator through a competitive bidding process.

1. Evaluation of DSMI's Impartiality

16. Section 251(e) requires the Commission to create or designate one or more impartial entities to administer telecommunications numbering and ensure that such numbers are made available on an equitable basis, and requires the costs of number administration to be borne by all telecommunications carriers on a competitively neutral basis.³⁷ The Commission set forth criteria for determining whether an entity meets these neutrality requirements in section 52.12 of its regulations in the *Number Administration Third Report and Order*.³⁸ Recently, the Commission applied these requirements to determine the neutrality of an entity seeking to replace Lockheed Martin IMS Corporation as the North American Numbering Plan Administrator, which administers standard geographic telephone numbers.³⁹ Although the toll free number administration system differs from the method used to administer the North American Numbering Plan, both are "telecommunications numbering" administrative systems, and thus are governed by section 251(e) and the Commission's neutrality regulations implementing this provision.

17. Because DSMI is the entity that administers the toll free numbering system pursuant to the SMS Tariff,⁴⁰ we apply the same neutrality criteria to DSMI that we applied in evaluating the neutrality of the NANP administrator.⁴¹ The neutrality criteria serve three purposes.⁴² First, they ensure that entities seeking to participate in the telecommunications marketplace obtain timely and efficient access to numbering resources, and that no particular industry segment is favored or disadvantaged. The criteria also ensure that the administrator remains neutral in order to maintain the trust and confidence of the entities that must submit sensitive information to the administrator in its numbering administration activities. Finally, the criteria ensure that the administrator is able to comply with its obligations without excessive Commission oversight. The first two criteria are objective, quantifiable measures intended to

³⁷ 47 U.S.C. §§ 251(e)(1), (2).

³⁸ 47 C.F.R. § 52.12.

³⁹ Request of Lockheed Martin Corporation and Warburg, Pincus & Co. for Review of the Transfer of the Lockheed Martin Communications Industry Services Business, *Order*, CC Docket No. 92-237, NSD File No. 98-151, FCC 99-346 (rel. Nov. 17, 1999) (*Lockheed Order*).

⁴⁰ See *Third Report and Order*, 12 FCC Rcd at 23089.

⁴¹ See *Third Report and Order* and *Lockheed Order*. In both these Orders, we applied the criteria set forth in the Commission's regulations. See 47 C.F.R. § 52.12(a)(1).

⁴² *Lockheed Order* at para. 24.

a majority of its debt to, nor derive a majority of its revenues from, any telecommunications provider.⁴⁹ According to Telcordia, DSMI does not carry debt "as a separate entity,"⁵⁰ and adds that its own debt is not derived from any telecommunications service provider, but rather, from public financial institutions.⁵¹ Telcordia also claims that neither it nor SAIC derives a majority of its revenues from any one telecommunications service provider.⁵² Nevertheless, we find that DSMI's income is primarily received from its relationship with the SMT, which is comprised entirely of BOCs. Although the BOCs are separate entities, we find that their interests are sufficiently aligned that they may be deemed collectively to be a telecommunications provider. Thus, the requirements of Criterion Two are not satisfied.

23. *Criterion Three: Undue Influence.* We now consider section 52.12(a)(1)(iii) of our rules, which provides that, notwithstanding the first two neutrality criteria, we may exercise our discretion to determine whether the administrator will be subject to undue influence by parties with a vested interest in the outcome of numbering administration and activities. We must determine, therefore, whether we believe DSMI will be subject to undue influence by any party with an interest in the outcome of numbering administration and activities.

24. DSMI is under contract to perform certain administrative duties relating to toll free number administration, including day-to-day management and oversight of SMS/800 services.⁵³ As discussed below, the terms of the SMS/800 Tariff are uniquely structured to ensure that the administration of toll free numbers is competitively neutral. Because DSMI may not exercise its discretion to administer toll free number services in a manner inconsistent with the tariff, we find that, under these specific circumstances, DSMI is not subject to undue influence by the BOCs or by any other entity with an interest in the administration of toll free numbers.

25. We are persuaded that DSMI acts as an impartial administrator because we agree with DSMI's assessment that the unique arrangement established in the SMS/800 Tariff and the Commission's rules ensure that it performs its activities as overseer of the day-to-day management of the SMS/800 system without discrimination. Under the tariff, the administration of toll free numbers is impartial because DSMI does not determine which RespOrgs may access or manage which toll free numbers. Rather, RespOrgs retrieve toll free numbers themselves, via computer interface.⁵⁴ As DSMI observes, RespOrgs have direct electronic access to the SMS/800 database, and thus can assign to their

⁴⁹ 47 C.F.R. § 52.12(a)(1)(ii).

⁵⁰ Bellcore Reply at 5.

⁵¹ *Id.*

⁵² *Id.*

⁵³ See para. 3, *supra*.

⁵⁴ Although AT&T, MCI, and Sprint object that the BOCs have implemented an expensive computerized method enabling smaller ("dial-up") RespOrgs to retrieve numbers from the SMS/800 database, even though those RespOrgs account for less than 10% of toll free numbers, that enhancement appears to be pro-competitive and does not suggest lack of impartiality. Ex Parte Presentation letter from James Spurlock, AT&T, Henry G. Hultquist and Mary DeLuca, MCI WorldCom, and Michael B. Fingerhut and Norina T. Moy, Sprint, to Magalie Salas, Secretary, Federal Communications Commission, dated January 7, 2000, at 11 (AT&T, MCI WorldCom, Sprint January 7, 2000, Ex Parte Letter).

a majority of its debt to, nor derive a majority of its revenues from, any telecommunications provider.⁴⁹ According to Telcordia, DSMI does not carry debt "as a separate entity,"⁵⁰ and adds that its own debt is not derived from any telecommunications service provider, but rather, from public financial institutions.⁵¹ Telcordia also claims that neither it nor SAIC derives a majority of its revenues from any one telecommunications service provider.⁵² Nevertheless, we find that DSMI's income is primarily received from its relationship with the SMT, which is comprised entirely of BOCs. Although the BOCs are separate entities, we find that their interests are sufficiently aligned that they may be deemed collectively to be a telecommunications provider. Thus, the requirements of Criterion Two are not satisfied.

23. *Criterion Three: Undue Influence.* We now consider section 52.12(a)(1)(iii) of our rules, which provides that, notwithstanding the first two neutrality criteria, we may exercise our discretion to determine whether the administrator will be subject to undue influence by parties with a vested interest in the outcome of numbering administration and activities. We must determine, therefore, whether we believe DSMI will be subject to undue influence by any party with an interest in the outcome of numbering administration and activities.

24. DSMI is under contract to perform certain administrative duties relating to toll free number administration, including day-to-day management and oversight of SMS/800 services.⁵³ As discussed below, the terms of the SMS/800 Tariff are uniquely structured to ensure that the administration of toll free numbers is competitively neutral. Because DSMI may not exercise its discretion to administer toll free number services in a manner inconsistent with the tariff, we find that, under these specific circumstances, DSMI is not subject to undue influence by the BOCs or by any other entity with an interest in the administration of toll free numbers.

25. We are persuaded that DSMI acts as an impartial administrator because we agree with DSMI's assessment that the unique arrangement established in the SMS/800 Tariff and the Commission's rules ensure that it performs its activities as overseer of the day-to-day management of the SMS/800 system without discrimination. Under the tariff, the administration of toll free numbers is impartial because DSMI does not determine which RespOrgs may access or manage which toll free numbers. Rather, RespOrgs retrieve toll free numbers themselves, via computer interface.⁵⁴ As DSMI observes, RespOrgs have direct electronic access to the SMS/800 database, and thus can assign to their

⁴⁹ 47 C.F.R. § 52.12(a)(1)(ii).

⁵⁰ Bellcore Reply at 5.

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⁵³ See para. 3, *supra*.

⁵⁴ Although AT&T, MCI, and Sprint object that the BOCs have implemented an expensive computerized method enabling smaller ("dial-up") RespOrgs to retrieve numbers from the SMS/800 database, even though those RespOrgs account for less than 10% of toll free numbers, that enhancement appears to be pro-competitive and does not suggest lack of impartiality. Ex Parte Presentation letter from James Spurlock, AT&T, Henry G. Hultquist and Mary DeLuca, MCI WorldCom, and Michael B. Fingerhut and Norina T. Moy, Sprint, to Magalie Salas, Secretary, Federal Communications Commission, dated January 7, 2000, at 11 (AT&T, MCI WorldCom, Sprint January 7, 2000, Ex Parte Letter).

A. Toll Free Number Access Codes Proceeding

15. In the *Third Report and Order*, the Commission concluded that, as then structured, DSMI's administration of the toll free number database was inconsistent with section 251(e)(1). In this section, we address whether DSMI currently is impartial within the meaning of section 251(e)(1). We find below that DSMI meets the impartiality requirements in section 251(e)(1) of the Act, and thus may continue to serve as the toll free number database administrator. We also seek recommendations from the NANC on restructuring the ownership and operation of the current system of toll free number administration, and on the technical requirements for selecting a toll free number administrator through a competitive bidding process.

1. Evaluation of DSMI's Impartiality

16. Section 251(e) requires the Commission to create or designate one or more impartial entities to administer telecommunications numbering and ensure that such numbers are made available on an equitable basis, and requires the costs of number administration to be borne by all telecommunications carriers on a competitively neutral basis.³⁷ The Commission set forth criteria for determining whether an entity meets these neutrality requirements in section 52.12 of its regulations in the *Number Administration Third Report and Order*.³⁸ Recently, the Commission applied these requirements to determine the neutrality of an entity seeking to replace Lockheed Martin IMS Corporation as the North American Numbering Plan Administrator, which administers standard geographic telephone numbers.³⁹ Although the toll free number administration system differs from the method used to administer the North American Numbering Plan, both are "telecommunications numbering" administrative systems, and thus are governed by section 251(e) and the Commission's neutrality regulations implementing this provision.

17. Because DSMI is the entity that administers the toll free numbering system pursuant to the SMS Tariff,⁴⁰ we apply the same neutrality criteria to DSMI that we applied in evaluating the neutrality of the NANP administrator.⁴¹ The neutrality criteria serve three purposes.⁴² First, they ensure that entities seeking to participate in the telecommunications marketplace obtain timely and efficient access to numbering resources, and that no particular industry segment is favored or disadvantaged. The criteria also ensure that the administrator remains neutral in order to maintain the trust and confidence of the entities that must submit sensitive information to the administrator in its numbering administration activities. Finally, the criteria ensure that the administrator is able to comply with its obligations without excessive Commission oversight. The first two criteria are objective, quantifiable measures intended to

³⁷ 47 U.S.C. §§ 251(e)(1), (2).

³⁸ 47 C.F.R. § 52.12.

³⁹ Request of Lockheed Martin Corporation and Warburg, Pincus & Co. for Review of the Transfer of the Lockheed Martin Communications Industry Services Business, *Order*, CC Docket No. 92-237, NSD File No. 98-151, FCC 99-346 (rel. Nov. 17, 1999) (*Lockheed Order*).

⁴⁰ See *Third Report and Order*, 12 FCC Rcd at 23089.

⁴¹ See *Third Report and Order* and *Lockheed Order*. In both these Orders, we applied the criteria set forth in the Commission's regulations. See 47 C.F.R. § 52.12(a)(1).

⁴² *Lockheed Order* at para. 24.

local telecommunications market; for example, the BOCs now represent a segment of the telecommunications industry in which at least some competition exists, unlike seven years ago when the tariffed system was established. The significant growth in competition has also brought about a marked increase in the demand for more toll free and other numbers, as new competitors seek to serve their customers and new services are offered. Thus, continued ownership and control by the BOCs over the toll free number administration system may no longer be warranted for competitive reasons.

27. We are also concerned about whether, from a practical standpoint, ownership and control of the centralized database by any telecommunications service provider is an appropriate structure for toll free numbering administration because of service quality issues that have arisen and apparently remain unresolved. In a recent letter to the Commission, ATIS observed that RespOrgs have experienced increasing difficulties with the SMS/800 system since 1997, noting that system congestion has increased as Numbering Plan Area splits have increased.⁶⁰ Additionally, some commenters in this proceeding claim to have experienced poor service under the SMS/800 Tariff.⁶¹ These commenters, however, do not attribute the service quality problems to DSMI, but to the BOCs, who own the database and offer the service through the SMS/800 Tariff.⁶² We decline to address these specific allegations in the context of this proceeding; such alleged instances of non-compliance with the terms of the SMS Tariff are best addressed through the complaint process.⁶³ Nevertheless, we recognize, generally, the need to consider whether these and other issues can be addressed and resolved through restructuring of the current administration system.

28. We look to our Federal Advisory Committee on numbering issues, the NANC, for a recommendation on how best to administer toll free numbers. We ask the NANC to address whether a system of administration similar to that used to administer the NANP or a different system should be established. Among the alternatives NANC should consider is whether the ownership and operation of the centralized toll free database system should be transferred to a non-government and/or non-carrier entity, and whether SMS/800 service should continue to be provided under tariff. Additionally, we seek recommendations from the NANC to facilitate the selection of the administrator through a competitive bidding process similar to the process used to select the North American Numbering Plan Administrator.⁶⁴ Specifically, we ask the NANC to develop the necessary technical requirements for toll free number administration. We direct the NANC to submit its recommendations to the Commission within 180 days of the effective date of this Order. Upon receipt of the NANC's recommendations and public comment, we will move expeditiously to determine whether it is in the public interest to restructure the ownership and operation of the current system of toll free number administration, and, if

⁶⁰ Letter from Ronald D. Havens, OBF Moderator, to L. Charles Keller, Chief, Network Services Division, Common Carrier Bureau, CC Docket No. 95-155 (filed Feb. 15, 2000).

⁶¹ See *January 7, 2000, Ex Parte Letter* (also complaining about high tariff rates). See also MCI Comments at 3 - 4 and Sprint Comments at 2 - 3, both filed July 1, 1998, and WorldCom Reply at 3 - 4, filed July 13, 1999.

⁶² *Id.*

⁶³ To the extent that parties can demonstrate that the BOCs or their designees are not administering toll free numbers pursuant to the terms of their own tariff, they may pursue an enforcement action to ensure that the terms of the tariff are met. See sections 1.701 - 1.736 of the Commission's rules, 47 C.F.R. §§ 1.701 - 1.736.

⁶⁴ See *Third Report and Order*.

Third Report and Order the Commission directed the North American Numbering Council (NANC) to examine the issue of toll free number administration and recommend an entity to assume the duties of toll free number administration.²⁴

9. In 1998, in response to the Commission's directive, the NANC submitted a letter recommending that DSMI remain the toll free number database administrator.²⁵ The NANC stated in its letter that Bellcore had recently been sold to Science Applications International Corporation (SAIC), which is not identified with any particular segment of the telecommunications industry, and determined that its subsidiary DSMI was therefore an impartial and neutral administrator.²⁶ In a public notice, the Commission requested comments on the NANC's recommendation.²⁷ In their comments, Telcordia, Ameritech, Bell Atlantic, BellSouth, SBC and US West generally supported the NANC's recommendation, whereas Beehive, AT&T, MCI WorldCom, and Sprint (non-BOC RespOrgs) strongly opposed it.²⁸ We address the NANC's recommendation below.²⁹

C. History of the Beehive-DSMI Dispute

10. The petitions for declaratory ruling that we resolve in this Order arise from a dispute originating in 1989, at which time Beehive Telephone Company, Inc. (Beehive), an incumbent local exchange carrier, received from Bellcore 10,000 toll free numbers in the "800" numbering plan area with the NXX prefix 629. In 1993, when the centralized database system was created, Beehive was authorized to act as a RespOrg. In 1994, after Beehive failed to pay service and late payment charges in accordance with the terms of the SMS/800 Tariff, DSMI revoked Beehive's RespOrg status and suspended services to Beehive. DSMI then requested that Beehive direct its customers to select a new RespOrg. After Beehive failed to do so, DSMI began disconnecting the numbers.

11. In 1996, DSMI filed a suit in federal district court to collect Beehive's unpaid charges.³⁰ Beehive then tendered payment to DSMI, but also filed an answer and a five-count counterclaim. In 1997, Beehive re-qualified as a RespOrg, and amended its counterclaim by adding two more counts. In

²⁴ The NANC is a federal advisory committee created to advise the Commission on numbering administration issues.

²⁵ Also in 1998, the Commission ruled on the roll-out of the 888, 877, and subsequent codes, in Toll Free Access Codes, *Fourth Report and Order and Order and Memorandum Opinion and Order*, CC Docket No. 95-155, 13 FCC Rcd 9058 (1998).

²⁶ Letter from Alan C. Hasselwander, Chairman, North American Numbering Council, to A. Richard Metzger, Jr., Chief, Common Carrier Bureau, CC Docket No. 95-155 (filed March 25, 1998) (*NANC Letter*).

²⁷ Common Carrier Bureau Seeks Comment on North American Numbering Council Recommendation that Database Services Management, Inc. Remain the Toll Free Database Administrator, *Public Notice*, CC Docket No. 95-155, NSD File No. L-98-85, DA-98-1112 (rel. June 11, 1998).

²⁸ Comments were filed July 1, 1998, by Bellcore, MCI Telecommunications Corporation, and Sprint Communications Company. Replies were filed July 13, 1998, by Bellcore, BellSouth, Beehive, MCI, and (jointly) Ameritech, Bell Atlantic, SBC, and US West. An ex parte statement dated August 31, 1998, was filed by Ameritech on behalf of the BOCs.

²⁹ See paras. 15-25.

³⁰ *DSMI v. Beehive*, No. Civ. No. 2:96-CV-188J (C.D. Utah filed Mar. 1, 1996).

carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis. . . .⁷¹ Beehive contends that under section 251 (c)(3), common carriers such as Beehive, Sprint, and MCI have the right to purchase access to the SMS/800 database as a UNE. DDMI and the BOCs argue that section 251(c)(3) applies only to the BOCs' separately owned networks and, because the BOCs jointly own the SMS/800 database, it is not a UNE.⁷² Beehive also contends that the 1996 Act precludes the Commission from continuing to require that access to the SMS/800 database be tariffed under section 203 of the Act because we determined that the SMS/800 database system is also accessible as a UNE under section 251(c).⁷³

33. Although we have found that access to the SMS/800 database and the SMS/800 system are available as UNEs pursuant to section 251(c)(3) of the Act, we expressly reject Beehive's argument that this invalidates the existing interstate tariff. The Commission recognized in the *Local Competition Third Report and Order* that ILECs may offer a tariffed retail service that is functionally equivalent to a specific UNE. The Commission found that, in determining whether or not an ILEC should provide access to a UNE, it would assign little weight to the availability of the tariff as an alternative because Congress gave competitive LECs a distinct opportunity, through section 251(c)(3), to use UNEs regardless of the availability of tariffed retail or resold services.⁷⁴

34. The findings in the *Local Competition Third Report and Order* can in no way be read to invalidate a tariffed offering simply because that offering could be equivalent to a specific UNE. An ILEC has a duty under section 251(c)(3) to provide access to UNEs to a requesting telecommunications carrier for the provision of a telecommunications service while a tariffed offering available under section 203(c) of the Act is available to any person.⁷⁵ Beehive's request to invalidate a tariffed offering simply because it is available as a UNE ignores a fundamental difference between sections 251(c)(3) and 203(c) of the Act, and would effectively deny access to the offering to entities that are not eligible to obtain UNEs under section 251(c)(3).

35. Issue 2: Whether DDMI is an impartial administrator of the SMS system, under section 251(e). We have concluded in this Order that DDMI is impartial and may continue to serve as a toll free administrator.⁷⁶

36. Issue 3: Whether the SMS/800 system complies with section 251(e)(2), which requires the costs of number administration arrangements and number portability to be borne by all carriers on a competitively neutral basis. RespOrgs, the users of the SMS/800 system, bear the costs associated with SMS/800 system administration in proportion to the quantity of toll free numbers they reserve or manage. Because the same rates are assessed against all RespOrgs under the SMS/800 Tariff, we find that the costs of toll free number administration are borne on a competitively neutral basis in accordance

⁷¹ 47 U.S.C. § 251(c).

⁷² BOC Comments at 5, DDMI Reply at 4.

⁷³ Beehive Reply at 6.

⁷⁴ See *Local Competition Third Report and Order*, 15 FCC Rcd at 3732.

⁷⁵ 47 U.S.C. §§ 251(c)(3), 203(c).

⁷⁶ See paras. 16 – 25, *supra*.

numbers for personal and business purposes, and for access to such services as voice mail and paging devices.

B. History of Toll Free Service and Section 251 Requirements

4. In 1967, AT&T began providing toll free service. Following AT&T's 1984 breakup,⁹ the BOCs succeeded AT&T in providing toll free number "area-of-service routing," which is the routing of calls by local exchange carriers to the appropriate IXC, depending upon the local access and transport area (LATA) in which the calls originated.¹⁰ Initially, the BOCs accomplished this by associating a particular NXX¹¹ with a particular carrier. That system, however, precluded "portability," which is the ability of subscribers to change IXCs while retaining the same toll free number. Thus, subscribers wishing to change their IXCs had to change their toll free numbers in order to do so.

5. In 1993, the Commission mandated that the BOCs develop a centralized database system to facilitate toll free number portability. Under this system, all toll free numbers are contained in a centralized database, and the LEC originating a call reads the entire number, interacts with the SCP to determine the IXC designated to carry the call, and transmits the call accordingly. Subscribers can thus change RespOrgs or IXCs without changing their toll free telephone numbers.¹² At the same time, the Commission also required that the service be offered as a common carrier service under tariff, to ensure that the service would be offered on a non-discriminatory basis and at reasonable rates.¹³

6. In 1995, the industry informed the Commission that available 800 toll free numbers were being depleted at an accelerated pace and were likely to run out before the scheduled roll-out of the first new toll free access code, 888, on March 1, 1996. The Commission therefore instituted the Toll Free Access Codes proceeding and proposed rules to ensure that toll free numbers would be allocated on a fair, equitable, and orderly basis.¹⁴ The Commission also took steps to conserve the use of toll free numbers to preclude a temporary shutdown of the toll free database system that might have resulted from an overload in the reservation process for the new 888 numbers.¹⁵

⁹ See *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, *Maryland v. United States*, 460 U.S. 1001 (1983). The Court ordered AT&T to divest its interest in the Bell Operating Companies (BOCs), which provided local exchange service.

¹⁰ Provision of Access for 800 Service, *Order*, CC Docket No. 86-10, 8 FCC Rcd 1423 (1993) (*CompTel Declaratory Ruling*).

¹¹ Telephone numbers are typically designated NPA-NXX-XXXX. The NXX, or the "central office code," is the series of three digits following the area code. The NXX is also referred to as the "exchange."

¹² *Id.*

¹³ *CompTel Declaratory Ruling*, 8 FCC Rcd at 1426-27.

¹⁴ Toll Free Access Codes, *Notice of Proposed Rulemaking*, CC Docket No. 95-155, 10 FCC Rcd 13692 (1995) (*NPRM*).

¹⁵ The Commission delegated to the Common Carrier Bureau authority to handle the issues essential to the March 1, 1996 opening of the 888 code. Toll Free Access Codes, *Order*, CC Docket No. 95-155, 11 FCC Rcd 3045 (1996). The Bureau then established an interim number conservation plan for 800 and 888 numbers, to protect the toll free database system from possible overload and shutdown during the number reservation process. Toll Free Access Codes, *Report and Order*, CC Docket No. 95-155, 11 FCC Rcd 2496 (1996).

providing services under the Act.⁸⁴ As we have stated before, “there is nothing in section 203 which colorably suggests that Congress intended to prohibit carriers from using agents to enforce provisions of their tariffs.”⁸⁵ It is not unusual for a common carrier that files a tariff to select an agent to perform certain functions associated with provision of a tariffed service. The National Exchange Carrier Association (NECA), for example, is not a common carrier, but it files, bills, and collects charges contained in interstate access tariffs on behalf of the issuing common carriers.⁸⁶ Similarly, DSMI, although it is not a common carrier, acts as the business representative of the SMT, which is comprised of the BOCs, and provides day-to-day management and oversight of the tariffed services. We find nothing inappropriate about the BOCs’ selection of an entity that is not a common carrier to perform certain tariff-related functions on their behalf.

40. Issue 6: Whether DSMI gave proper notice before discontinuing service to Beehive. Beehive alleges that DSMI violated the tariff because DSMI terminated Beehive’s service without notice.⁸⁷ Section 2.1.8(A) of the tariff requires 30 days’ written notice prior to terminating a Resp Org’s access to the SMS/800 database system. DSMI states that it provided written notice on three separate occasions, with its last letter dated March 22, 1994, and Beehive doesn’t dispute receipt of these letters.⁸⁸ More than 30 days later, on April 26, 1994, Beehive’s service was suspended.⁸⁹ We therefore find that DSMI’s notice to Beehive was proper.

41. Issue 7: Whether Beehive held a constitutionally protected property interest in toll free numbers that DSMI violated by discontinuing service to Beehive. It is well-established that no entity has a proprietary or ownership interest in any numbers, including toll free numbers.⁹⁰ Beehive maintains that it was deprived of a constitutionally protected property or ownership interest when DSMI disconnected its 800-629-XXXX numbers, reasoning that the opportunity to make use of numbers has marketing value that may not simply be taken away. On the other hand, DSMI contends that numbers are a public

⁸⁴ 47 U.S.C. § 217 (“Liability of Carrier for Acts and Omissions of Agents”). Section 217 states that, in construing and enforcing the provisions of the Act, “. . . the act, omission, or failure of any office, agent or other person . . . shall be deemed to be the act, omission or failure of such carrier or user as well as that of the person.” It does not require that the agent be a common carrier.

⁸⁵ In the Matter of Communique Telecommunications, Inc. d/b/a/ Logically Application for Review of the Declaratory Ruling and Order Issued by the Common Carrier Bureau, *Memorandum Opinion and Order*, FCC 99-80, rel. Aug. 9, 1999 at paras. 19 and 24.

⁸⁶ NECA Tariff No. 4.

⁸⁷ Beehive Reply at 16.

⁸⁸ DSMI Reply at 11 (referring to letters dated November 29, 1993, February 14, 1994, and March 22, 1994).

⁸⁹ DSMI Addendum to Petition of Database Service Management, Inc. for Expedited Declaratory Ruling at 2.

⁹⁰ The Commission stated in the *Second Report and Order* that “telephone companies do not ‘own’ codes or numbers, but rather administer their distribution for the efficient operation of the public switched telephone network” 12 FCC Rcd at 11185-86 (citing *Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, *Declaratory Ruling*, 2 FCC Rcd 2910, 2912 (1987)). The SMS/800 Tariff comports with this policy, providing, “No individual or entity (e.g., subscriber/assignee, service provider, etc.) shall acquire any interest in, or proprietary right to, any 800 telephone number assigned to the 800 subscriber.” Section 2.1.7, *Provision and Ownership of 800 Telephone Numbers*.

I. INTRODUCTION

1. In this Order, we resolve outstanding issues raised in our toll free number rulemaking proceeding¹ related to the propriety of Database Service Management Inc. (DSMI) serving as an administrator of the toll free number database system as well as related issues referred to the Commission from the United States District Court for the District of Utah.² We approve the recommendation of the North American Numbering Council (NANC) that DSMI continue to serve as the administrator of the toll free number database system, referred to as the SMS/800 system, at this time. We find that DSMI is an impartial administrator under section 251(e)(1) of the Communications Act.³ We also resolve seven specific issues presented in petitions for declaratory ruling filed by Beehive Telephone Company (Beehive) and DSMI, following court referral, relating to the propriety of DSMI's administration of the SMS/800 system, and the revocation of toll free numbers assigned to Beehive. In doing so, we conclude that access to the SMS/800 database is properly tariffed and administered as a common carrier service. We further conclude that the Commission's determination that access to call-related databases and service management systems are unbundled network elements under section 251(c)(3)⁴ does not invalidate the existing interstate tariff under which toll free service providers purchase access to the centralized SMS/800 database offered collectively by the Bell Operating Companies (BOCs). Finally, we direct the North American Numbering Council (NANC) to provide recommendations on restructuring the ownership and operation of the current system of toll free number administration.

II. BACKGROUND

A. Overview - The Toll Free Service System

2. Toll free service is an interexchange service in which subscribers agree in advance to pay for all calls made to them using a predesignated toll free telephone number. Toll free numbers are contained in a centralized database, the Service Management System/800 (SMS/800) database, and use of the database is offered jointly by the BOCs through a tariff.⁵ This centralized toll free number administration system has the following components:

SMS/800 Database. The SMS/800 database contains all toll free numbers in the North American Numbering Plan, along with electronic records for those numbers. The records include information such as the identity of the subscribers' telephone numbers to which toll free calls will be routed (area

¹ In the Matter of Toll Free Access Codes, CC Docket No. 95-155.

² *Database Service Management, Inc. v. Beehive Telephone Company, Inc.*, Civ. No. 2:96-CV-188J (C.D. Utah Jan. 20, 1999). Following referral, the parties before the court presented the issues to this Commission in petitions for declaratory ruling filed by Beehive Telephone Company Inc. (Beehive) on January 29, 1999, and by Database Service Management, Inc. (DSMI) on February 17, 1999.

³ 47 U.S.C. § 251(e)(1).

⁴ 47 U.S.C. § 251(c)(3).

⁵ The tariffed service is described as "a national system which is used to update locally deployed databases," and is the focal point for initial service provisioning and all subsequent changes to the toll free subscriber's service. It supports number administration, creation and modification of customer records. See SMS/800 Functions Tariff F.C.C. No. 1 at 47.